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No. 85-1600

In The
Supreme Court of the United States
October Term, 1985

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, et al.,

Petitioners,

v.

AL FRIEDMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Paul A. Phillips*
Cooperating Attorney
Philip Davis, Legal Director
ACLU of New Mexico
300 Central, S.W., Suite 1000W
Albuquerque, New Mexico 87102
(505) 247-4051

*Counsel of Record

ADOBE PRESS, INC., Albuquerque, New Mexico, (505) 873-1155

QUESTION PRESENTED

Does Bernalillo County, State of New Mexico, violate the Establishment Clause by its constant and widely visible use of a county seal depicting four mountains, with a golden-colored Latin cross, larger than the mountains, set in the sky above the mountains and from which shafts of golden-colored light emanate, and below which are depicted eight sheep on a green plain and arching above which appear the Spanish words CON ESTA VENCEMOS (with this we conquer), while around the border of the seal appear the phrases BERNALILLO COUNTY and STATE OF NEW MEXICO, separated by a diamond figure on each side of the border?[1]

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[1]Pictures of the seal from photographic exhibits introduced in evidence at the trial appear at Petition Appendix p. 12a and p. 13a, since they are appended to the opinion of the Court below, 781 F.2d 777 at pp. 783, 784 (10th Cir. 1985).

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The District Court opinion, holding in favor of the County, is reported at 528 F. Supp. 919 (D.N.M. 1981) and reprinted in full in the Appendix to the Petition commencing at Page 40a.

The opinion of the Tenth Circuit panel, agreeing with the District Court (Chief Judge Holloway writing for himself and Judge McWilliams) is appended to the opinions dissenting from the *en banc* decision of the Tenth Circuit and appears at 781 F.2d pp. 786-792 and in the Appendix to the Petition commencing at p. 18a.

The opinion of Judge Logan, dissenting from the

decision of the panel, seems not to have been published, but appears at pp. 36a-39a of the Appendix to the Petition.

The opinion of Judge Logan writing for the majority of the Tenth Circuit sitting *en banc*, which the Petitioners seek to have reviewed, is reported at 781 F.2d 777 (10th Cir. 1985). Judge Logan was joined by Judges McKay, Seymour, and Moore and Chief Judge Holloway. Judge McWilliams dissented, adhering to the views expressed by Chief Judge Holloway when he wrote for the panel. Judge Barrett also dissented, expressing concurrence with Chief Judge Holloway's former opinion and adding additional views of his own. The opinion on rehearing *en banc* and the dissents appear in the Appendix to the Petition commencing at Page 1a.

STATEMENT OF THE CASE

Respondent supplements the Petitioner's Statement of the Case as follows:

Until 1973 few people had occasion to see or to know of the existence of the Bernalillo County Seal having a cross and the motto "Con Esta Vencemos." There had existed a black and white seal for authenticating documents which contained the design and motto. The earliest use of that seal established on the trial was in 1925 on a lease instrument executed by the County. Its use, even to seal documents, was not continuous over the years since 1925. Two former County Commissioners testified they never used it or even saw it during their tenure on the Commission in the 1960s. (Tr. 52-54, 58-59)

From 1973 on it has been used in living color on all County vehicles, including Sheriff Department vehicles and

on Sheriff Deputies' shoulder patches, and in black and white on County stationery.

Petitioners state the "seal symbolizes the historic importance of the role played by Spanish Catholicism in the development of New Mexico and, more particularly, Bernalillo County." (Petition p. 5)

Yet the motto states, in Spanish, "with the cross we conquer." That is no historical statement—it is a continuing statement of a continuing profession of faith being made by a political subdivision.

The Petition recites some historical facts, quoting from the opinion of the District Judge, concerning the preeminent connection of the Spanish Catholic clergy with the exploration and development of New Mexico. (Petition pp. 5 & 6)

One should also mention that the District Judge acknowledged "that the pages of history of the Southwest record dark deeds committed under the aegis of religion." 528 F. Supp. 919, 921 (D.N.M. 1981) Petition Appendix 42a.

REASONS FOR DENYING THE WRIT

Respondent states the following as reasons why the Court should deny the Petition:

1. The case is of purely parochial interest and is without national significance.

2. There exists no conflict between the decision of the Court of Appeals for the Tenth Circuit and any decision of this Court nor any decisions in other Circuits.

3. The Tenth Circuit correctly decided the case.

4. Petitioners' argument is without merit.

1. The case is of purely parochial interest and is without national significance.

The Bernalillo County Seal is unique and the use to which the County Commissioners have been putting that unique seal since 1973 has no equivalent, so far as the record in this case shows and so far as the Petition reveals.

This case has no national significance, although of great importance to the inhabitants of Bernalillo County, New Mexico.

In an attempt to show that many state and local seals "coats of arms" and flags would not survive constitutional scrutiny should the Tenth Circuit decision be allowed to stand, Petitioners have annexed to the Petition some 29 illustrations, including one of the Bernalillo County Seal in black and white, of "flags, seals and coats of arms that symbolize America's Religious Heritage."

We submit that none of these 28 other illustrations compares to the Bernalillo County Seal in its endorsement of a particular faith. Some have a cross or even crosses, but none carries a motto praising the magic qualities of the cross except that of Bernalillo County. Only Bernalillo County says we conquer (win, overcome) with the cross.

Of all the seals, flags and coats of arms bearing a cross or crosses, only those of Bernalillo County and the town of Zion, Illinois, contain the name of the locality.

But what other flags, seals, coats of arms, etc. may contain is irrelevant unless there be also revealed the *use* to which the same are put by the political subdivisions having the particular flag, seal and/or coat of arms and the length of time which has expired since such use began. The use by political subdivisions named in the "sampling" of

the emblems shown on the "sampling" is unknown—except for Bernalillo County, which uses its religious statement on all its motor vehicles, sheriff's department's vehicles, sheriff's uniforms as well as on its stationery—every day of every year—all the time.

The uniqueness of the case is in the combination of cross, motto, and incessant use in recent years, by which Bernalillo County thrusts its religious statement upon the public. We submit there is nothing comparable and the case is unworthy of this Court's review for that reason alone.

2. There is no conflict between the Tenth Circuit's decision and any decision of this Court nor any decisions in other Circuits.

There is no conflict in reasoning or otherwise between the Tenth Circuit's decision in the instant case and this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The distinction between the situations in *Lynch v. Donnelly* and in the instant case is clearly stated by the Tenth Circuit:

> "This case is not like the creche display upheld in *Lynch*.... The religious significance of the cross, as of the creche, is undisputed; the district court correctly observed that any statement to the contrary would be disingenuous.... But the seal, unlike the creche, pervades the daily lives of county residents. It is not displayed once a year for a brief period on a single parcel of government land. Rather it appears on all county paperwork, on all county vehicles, even on county sheriff's uniforms. Further Bernalillo County residents do not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents do the creche."

The Tenth Circuit went on to note that the Christian religion "seems to be embraced as the instrument by which the county 'conquers'" and concluded that the seal and its use by the County put the "power, prestige and financial support of government behind a particular religious belief." 781 F.2d 777 at p. 782.

We submit this reasoning is in accord with the views of at least eight justices of this Court that the First Amendment was made appllicable to the States by the Fourteenth and prohibits any political subdivision from being other than neutral in the "competition between sects." *Zorach v. Clausen*, 343 U.S. 306, 314 (1952).

The decision of the Tenth Circuit, moreover, is not in conflict with any decisions from other circuits. Where Federal Courts have dealt with exhibiting the cross on public property, they have been in accord with the Tenth Circuit's decision in this case. *ACLU of Georgia v. Rabun County Chamber of Commerce*, 510 F.Supp. 886 (N.D.Ga. 1981), aff'd 678 F.2d 1379 (11th Cir. 1982), reh'g den. modified 698 F.2d 1098 (11th Cir. 1983); *Greater Houston Chapter of ACLU v. Eckels*, 589 F.Supp. 222 (S.D. Tex. 1984), App. Dis. 755 F.2d 426 (5th Cir. 1985), reh'g den., 763 F.2d 180 (5th Cir. 1985); *ACLU of Illinois v. City of St. Charles*, 622 F.Supp. 1542 (N.D.Ill. 1985) and *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn. 1985).

3. The Tenth Circuit correctly decided the case.

The decision of the Tenth Circuit on rehearing *en banc* is eminently correct.

The record in this case shows that Bernalillo County, starting only as recently as 1973, has been displaying on all county vehicles, sheriff's vehicles, sheriff's uniforms and

county stationery, an emblem and motto which the average person may perceive to endorse the Christian religion.

The cross in the sky with the motto CON ESTA VENCEMOS states the cross [the symbol through which the church speaks (*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943))] has mystical power with which we inhabitants of Bernalillo County conquer, win, overcome. Such a statement may not constitutionally be constantly made by a political subdivision.

This is all the Tenth Circuit held and in so doing was correct.

This case is not about use of religious symbols in the course of celebrating a secular holiday with religious origins; this case is not about using religious symbols at an annual fiesta celebrating the reconquest of the Pueblo Indians by de Vargas; this case is not about authenticating county documents that few people see with an imprint bearing a religious symbol. This case is about a recently begun but now constant, unabating endorsement of a particular faith by a political subdivision using that faith's symbol and a motto praising the symbol's efficacy upon county vehicles, sheriff vehicles and uniforms, tax assessment notices, and letterheads.

The effect of such use is a message of endorsement of the Christian faith, prohibited by the Establishment Clause. That is the eminently correct holding of the Tenth Circuit. See *Lynch v. Donnelly*, 465 U.S. at 687, 690, 692, O'Connor, J. concurring.

4. Petitioners' argument is without merit.

The Petitioners state (Petition p. 13) that the Tenth Circuit's reasoning "would require the purging of all

benign references by local government to the historical role of religion in American life." This statement is absurd. Whatever a "benign" reference to the historical role of religion in American life might be, there is nothing historical in a statement such as "we in Bernalillo County win with the cross." One person may consider it "benign" and another might consider it "militant." But it is a statement as to *current* events *not* historical ones.

As previously noted, contrary to Petitioners contention (Petition pp. 13-15) there is no conflict between the Tenth Circuit's decision and *Lynch v. Donnelly*.

The Petitioner's contention that the Tenth Circuit misapplied the *Lemon* test in holding the County's practice failed the effect question on the three question test is baseless.

The Tenth Circuit left to one side the purpose and entanglement questions, 781 F.2d at p. 780, n. 3, and held the effect question was failed because the seal and its use conveys a message of endorsement of a particular faith by the political subdivision.

The basis for that holding was not testimony concerning the cross at times being a symbol of oppression to the Jewish people; nor any argument as to the impact on Moslems or Northern Irish Protestants or Native Americans, as Petitioners argue (Petition pp. 12-13). The conclusion was reached by considering the evidence as to the *use* of the seal; the photographs of the seal in certain uses; the "highly persuasive evidence that the seal leads the average observer to the conclusion that the county government was 'advertising' the Catholic faith." A Rabbi's testimony "that the seal suggested to him that there was an 'officialness' about Christianity in the state and county."

781 F.2d at p. 781 (Petitioner Appendix 9a)

The material about oppression negates the idea that the composition of the seal merely contains a "benign" reference to religion. It is, however the message of endorsement which the average observer sees in the seal and its use that causes the failure of the effect test—not the horror that some people feel on receipt of that message—although the latter provides one good reason to enforce the Establishment Clause which prohibits government from communicating such a message.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

/s/ Paul A. Phillips

Paul A. Phillips*
Cooperating Attorney
Philip Davis, Legal Director
ACLU of New Mexico
300 Central, S.W., Suite 1000W
Albuquerque, New Mexico 87102
(505) 247-4051

*Counsel of Record